MOTION FILED
SEP 30 1988

Nos. 87-1939, 87-2008

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GEOFFREY W. BARNARD, AS CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,
Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court of Appeals
For The Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF PAUL HOFFMAN AND BARBARA MIGNON WEATHERLY AS *AMICI CURIAE* URGING AFFIRMANCE

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MOTION FOR LEAVE TO FILE BRIEF OF PAUL HOFFMAN AND BARBARA MIGNON WEATHERLY AS *AMICI CURIAE* URGING AFFIRMANCE

Pursuant to Rule 36.3 of the Rules of this Court, Paul Hoffman and Barbara Mignon Weatherly respectfully move for leave to file the annexed brief as *amici curiae* urging affirmance.

Paul Hoffman moved to St. Thomas, United States Virgin Islands, in 1948, with his parents. He was less than two years old at the time. He was graduated from Harvard Law School in 1974, and has been admitted to the practice of law in the Virgin Islands (1974) and the

District of Columbia (1975). After serving as a law clerk and an Assistant United States Attorney in the District of Columbia, he returned home to the Virgin Islands in 1979. He is a member of the Virgin Islands Bar Association and practices law in St. Thomas as the sole shareholder, director, and officer of Paul Hoffman, P.C. Mr. Hoffman served as a member of the Board of Governors of the Virgin Islands Bar Association in 1983 and 1984.

Barbara Mignon Weatherly is an associate attorney in the law firm of Paul Hoffman, P.C. She was graduated from the University of South Carolina Law Center in 1974, and was subsequently admitted to the practice of law in South Carolina (1974), Delaware (1979), and the Virgin Islands (1988). Ms. Weatherly sat for the Virgin Islands Bar Examination in July 1987, and learned by letter dated December 22, 1987, that she had passed the examination. However, due to the operation of Rule 56(b)(4), she was not able to be sworn in as a member of the Virgin Islands Bar Association until August 5, 1988. Upon being admitted to the bar, she received a substantial raise from the salary she had been earning as a law clerk.

Amici, as residents of St. Thomas and practicing members of the Virgin Islands Bar Association, have a vital interest in the outcome of this case. *Amici* strongly feel that their professional interests as practicing attorneys will best be served if no unnecessary obstacles are placed in the path of qualified applicants seeking to practice law in the Virgin Islands. If qualified applicants face no excessive barriers to their relocation to the Virgin Islands or to their practice of law in the Virgin Islands while maintaining a residence on the mainland, the economic development of the Virgin Islands will be promoted. The restrictive residence rule which is being challenged in this case prevents otherwise-qualified applicants from becoming members of the Virgin Islands Bar Association, simply because they are not residents of the Islands or because, even if residents, they have moved to the Virgin Islands within the past year. By denying admission purely on the basis of residence, Rule 56(b)(4) excludes applicants who would be able and dedicated members of the Virgin Islands Bar Association, and it disserves the clients who may wish to be represented by them.

Each of the *amici* has been directly and substantially affected by the bar residence rule which is being challenged in this case. When Ms. Weatherly decided to relocate to the Virgin Islands, she could not become a member of the Virgin Islands Bar Association until after she moved to St. Thomas, and in fact her admission was delayed until a full year after her move. Mr. Hoffman, on the other hand, needed an associate to assist him in his practice, which consists principally of real estate matters. Although Ms. Weatherly had passed the July 1987 bar examination, her role in Mr. Hoffman's office was of necessity severely curtailed until she was admitted to the bar in the Virgin Islands. For example, she could not attend real estate closings as an attorney, requiring that Mr. Hoffman attend with her.

Counsel for petitioner Geoffrey W. Barnard declined to consent to the filing of the annexed brief. Mr. Colianni, counsel for petitioner Virgin Islands Bar Association, will be in Europe until after the date upon which the annexed brief is due to be filed, and counsel for *amici* was informed that in Mr. Colianni's absence no one else had the authority to consent to the filing of the brief. Counsel for the respondents has consented to the filing of the brief.

Mr. Hoffman and Ms. Weatherly respectfully request that they be permitted to file the annexed brief as *amici curiae*. As attorneys who practice law in St. Thomas as members of the Virgin Islands Bar Association, they will address the constitutionality of the residence requirement from a perspective markedly different from that which will be taken by any other party. *Amici* respectfully suggest that it will be useful for this Court to consider the views of Virgin Islands attorneys who oppose the existing residence requirement as overbroad, unnecessary, and harmful to the economic development of the Virgin Islands.

Respectfully submitted,

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BRIEF OF PAUL HOFFMAN AND BARBARA MIGNON WEATHERLY AS *AMICI CURIAE* URGING AFFIRMANCE

Interest Of The *Amici*

Paul Hoffman moved to St. Thomas, United States Virgin Islands, in 1948, with his parents. He was less than two years old at the time. He was graduated from Harvard Law School in 1974, and has been admitted to the practice of law in the Virgin Islands (1974) and the District of Columbia (1975). After serving as a law clerk and an Assistant United States Attorney in the District of Columbia, he returned home to the Virgin Islands in 1979. He is a member of the Virgin Islands Bar Association and practices law in St. Thomas as the

sole shareholder, director, and officer of Paul Hoffman, P.C. Mr. Hoffman served as a member of the Board of Governors of the Virgin Islands Bar Association in 1983 and 1984.

Barbara Mignon Weatherly was graduated from the University of South Carolina Law Center in 1974, and was subsequently admitted to the practice of law in South Carolina (1974), Delaware (1979), and the Virgin Islands (1988). Ms. Weatherly is now employed as an associate attorney in the law firm of Paul Hoffman, P.C. However, for the time between when she moved to St. Thomas in July of 1987 and the expiration of the one-year period of residence required by the rule at issue in this case, she was employed as a law clerk. Ms. Weatherly sat for the Virgin Islands Bar Examination in July 1987, and learned by letter dated December 22, 1987, that she had passed the examination. However, due to the operation of Rule 56(b)(4), she was not able to be sworn in as a member of the Virgin Islands Bar Association until August 5, 1988. Upon being admitted to the bar, she received a substantial raise from the salary she had been earning as a law clerk.

Amici, as residents of St. Thomas and practicing members of the Virgin Islands Bar Association, have a vital interest in the outcome of this case. *Amici* strongly feel that their professional interests as practicing attorneys will be advanced if no unnecessary obstacles are placed in the path of qualified applicants seeking to practice law in the Virgin Islands. If qualified applicants face no excessive barriers to their relocation to the Virgin Islands or to their practice of law in the Virgin Islands while maintaining a residence on the mainland, the economic development of the Virgin Islands will be promoted. The restrictive residence rule which is being challenged in this case prevents otherwise-qualified applicants from becoming members of the Virgin Islands Bar Association, simply because they are not residents of the Islands or because, even if residents, they have moved to the Virgin Islands within the past year. By denying admission to qualified applicants purely on the basis of their residence, Rule 56(b)(4), and the related requirement contained in Rule 56(b)(5), harm the applicants, the Virgin Islands attorneys who wish to employ the best-qualified attorneys in their firms, and the clients who would choose to be represented by the applicants following their admission to the bar.

Each of the *amici* has been directly and substantially affected by the bar residence rule which is being challenged in this case. When Ms. Weatherly decided to relocate to the Virgin Islands, she could not become a member of the Virgin Islands Bar Association until after she moved to St. Thomas, and in fact her admission was delayed until a full year after her move. Even though she passed the bar examination and was fully qualified to practice law, by operation of the restrictive residence rule she was forced to continue working as a law clerk until the waiting period was fulfilled. Mr. Hoffman, on the other hand, needed an associate to assist him in his practice, which consists principally of real estate matters. Although Ms. Weatherly had passed the July 1987 bar examination, her role in Mr. Hoffman's office was of necessity severely curtailed until she was admitted to the bar in the Virgin Islands. For example, she could not attend real estate closings as an attorney, requiring that Mr. Hoffman be present with her at the closings. These difficulties are typical of those which every Virgin Islands firm faces in attempting to hire attorneys from the mainland in order to fully serve the firm's clients. Any attorney who does not already live in the Virgin Islands will be discouraged from accepting legal employment in St. Thomas for the same reasons that Ms. Weatherly's relocation was so difficult: the residence requirement delays bar admission significantly, which restricts the tasks which the attorney may perform and forces her to accept the reduced responsibilities (and reduced salary) of a law clerk.

For the reasons that will be developed below, *amici* respectfully suggest that the residence requirement imposed by Rule 56(b)(4) and (b)(5) are unconstitutional, and that accordingly the judgment entered by the United States Court of Appeals for the Third Circuit should be affirmed.

Summary Of Argument

Under this Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), only an exceedingly strong justification could warrant the decision of the Virgin Islands to exclude all nonresidents from the practice of law. Under *Piper*, a substantial

reason must be shown for discriminating against nonresidents, and the discrimination must bear a substantial relationship to the State's objective. The rules at issue here, which totally exclude all nonresidents from the Virgin Islands Bar Association, and which even go so far as to exclude applicants who have been residents for less than a year, come nowhere close to meeting the *Piper* test.

The district court upheld the residence requirement, and petitioners defend it, principally on the basis of the allegedly inferior services available to those who live and work in the Virgin Islands. Travel to and from the mainland, long distance telephone service, and mail delivery are all described as inferior, and it is said that no nonresident could even determine the law of the Virgin Islands, since publication of recent decisions may be delayed. As will be discussed below, these allegations do not accurately describe the way that law is practiced in the Virgin Islands today. Attorneys practicing in the Islands, like their counterparts across the country, do sometimes encounter inconveniences in representing their clients. However, there are no circumstances unique to the Virgin Islands which would prevent a conscientious member of the Virgin Islands bar from providing excellent representation to that attorney's clients, whether or not the attorney is a resident.

Even if the petitioners could demonstrate a substantial reason for discriminating against nonresidents, which they have not done, the residence requirement would fail because it bears no close or substantial relationship to any proper purpose. Any legitimate end which might be served by the residence requirement could be accomplished by means which are much less restrictive, such as by requiring nonresident attorneys to associate local counsel in cases in which emergency hearings might be expected to occur. In *Piper*, this Court undertook a very practical analysis of the alternatives which are available to serve the ends ostensibly promoted by residence requirements, and under the analysis called for by *Piper* it is plain that the Virgin Islands cannot justify the total exclusion of all nonresidents from its bar.

Petitioners allege that nonresidents cannot be admitted to the Virgin

Islands bar because they would not carry their fair share of the burden of representing indigent criminal defendants. This concern is premature, since there is no basis for concluding that nonresidents, once admitted, would fail to accept their share of court appointments in criminal cases. To the extent that certain aspects of the existing system of making such appointments would make it inconvenient for nonresidents to discharge their responsibilities, the district court should adopt the less restrictive alternatives which are at its disposal, rather than excluding all nonresidents and thereby assuring that the resident members of the Virgin Islands bar will continue to carry the full burden.

Ultimately, the residence requirement at issue in this case is unsupported by any justification which comes close to meeting the test laid down by *Piper*. Although the requirement may be based on an unarticulated desire to insulate attorneys in the Virgin Islands from competitive forces, any such purpose would be both unconstitutional and contrary to the long-run economic interests of the Virgin Islands. Just as the economic health of our Nation depends on the absence of internal trade barriers, so does the economic health of the Virgin Islands depend on integration into the economy of the mainland. Qualified applicants should be admitted to the bar of the Virgin Islands without regard to their residence, just as qualified nonresidents are now admitted to the bar of every State.

ARGUMENT

I. THE RESIDENCE REQUIREMENT IMPOSED BY RULE 56(b) IS UNCONSTITUTIONAL BECAUSE THERE IS NO SUBSTANTIAL REASON FOR THE DIFFERENCE IN TREATMENT IMPOSED ON OTHERWISE-QUALIFIED NONRESIDENTS.

This Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), clearly delineates the standard which must be applied in determining whether the residence requirement imposed on those seeking to practice law in the Virgin Islands can withstand

scrutiny under the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. In *Piper*, this Court held that "the right to practice law is protected by the Privileges and Immunities Clause." 470 U.S. at 283. However, the Privileges and Immunities Clause, which is applicable to the Virgin Islands by virtue of 48 U.S.C. § 1561 (the Revised Organic Act), is not absolute:

> The Clause does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.

Piper, 470 U.S. at 284. Although the Court of Appeals did not address the Privileges and Immunities Clause issue raised in this case because it determined that Rules 56(b)(4) and (b)(5) should be invalidated by the exercise of the court's supervisory power, Appendix to Petition for Certiorari in No. 87-1939 (hereinafter cited as "Pet. App.") at 7a-9a, *amici* respectfully urge that the most direct path to resolution of this controversy is provided by the Privileges and Immunities Clause. Reliance on the seldom-discussed supervisory power in *Frazier v. Heebe*, 107 S. Ct. 2607 (1987), was perhaps attributable to the fact that by its terms the Privileges and Immunities Clause of Article IV binds the states, not the federal government. Here, the Privileges and Immunities Clause is fully applicable by statute, making it unnecessary for this Court to go beyond the clear principles articulated in *Piper*.

Petitioners defend Rules 56(b)(4) and (b)(5) against respondents' Privileges and Immunities Clause attack at pages 30- 37 of their joint brief. The essence of their argument is that while a residence requirement is unconstitutional if imposed on the mainland, "the territory's geographic isolation and the attendant difficulties in transportation and communication justify the residency requirements." Pet. Br. at 31. In addition, petitioners allege, and the district court found, that nonresidents "simply lacked practical access to current Virgin Islands law," Pet. Br. at 33, and that the Islands' system of mandatory appointments to represent indigent criminal defendants "would be ab-

solutely unworkable with nonresidents." Pet. Br. at 34. None of these purported justifications for the residence requirement comes close to meeting the stringent standard laid down by *Piper*, and in fact each of these arguments is a first cousin of those already rejected by this Court.

Before attempting to apply the teachings of *Piper* to the particular circumstances of the Virgin Islands, it is useful to recall how broad Rule 56(b) is. The rule provides:

> (b) Each applicant for examination under the preceding section must file an application with the Committee of Bar Examiners at least 30 days prior to the date prescribed for annual examination as above, in which he must allege and prove to the satisfaction of the committee that:
>
> . . .
>
> 4. He shall have resided in the Virgin Islands for at least one year immediately preceding his proposed admission to the Virgin Islands Bar; and
>
> 5. If admitted to practice, he intends to continue to reside in and to practice law in the Virgin Islands;
>
> . . .

Attorneys, once admitted to practice in the Virgin Islands, "who cease to be domiciled in the Virgin Islands, shall cease to be active members" of the Virgin Islands Bar Association. V.I. Code, Title 5, App. V, Rule 51 (By-Laws of the Virgin Islands Bar Association Integrated), at I.5, I.6. *See* Jt. App. at 40. Thus, the earliest that one seeking admission to practice in the Virgin Islands can actually qualify as an attorney is a full year after declaring an intention to "reside in and to practice law in the Virgin Islands" and taking the bar examination. As Ms. Weatherly's experience demonstrates, bar examination results are released approximately five months after the July examination, yet admission cannot take place until the applicant has resided in the Virgin Islands for a year. If, after passing the bar examination, completing a year's residence, and being sworn in as a bar member, an

attorney ceases to maintain her domicile in the Virgin Islands, she ceases to be an active member of the Virgin Islands Bar Association and loses the right to appear in the district court and the territorial court.

The district court held that the one-year durational residence requirement "is the least restrictive means of preventing the harm which would be caused by the admission of nonresident attorneys to the bar." Pet. App. at 67a. The court explained that many of those who move to the Virgin Islands find life there unpleasant and soon return to the mainland, making the one-year residence requirement "the best circumstantial guarantee of an applicant's resolution to remain in the territory." *Id.* The court did not identify any harms which would result if some of those admitted to the Virgin Islands bar after passing the bar examination later left the Islands. In any event, petitioners say nary a word in defense of the durational aspect of the residence requirement.

At the outset, it should be noted that the residence requirement at issue in this case imposes a much greater burden on nonresidents than did the requirement invalidated in *Piper*. All that New Hampshire required was residence at the time of admission to the bar. Thus, an applicant like Ms. Weatherly who was relocating from one state to another could, upon passing the bar examination, move to New Hampshire and immediately begin practicing her profession. Moreover, an attorney who was admitted to the New Hampshire bar and later decided to move to another state was not stripped of active membership in the New Hampshire bar. As described above, the burdens imposed on nonresidents solely because of their nonresidence is much more severe in this case.

While the burden imposed on nonresidents is much greater here, petitioners have been no more successful than was New Hampshire in demonstrating that "there is a substantial reason for the difference in treatment." *Piper*, 470 U.S. at 284. Much of the burden of sustaining the residence requirement has fallen on anecdotal horror stories about how difficult it is to live and practice law in the Virgin Islands. According to the district court, air travel on short notice "remains

difficult, if not impossible," telephone service is "erratic" and connections with the mainland are frequently unavailable, and the services which provide for the transport of materials and documents to and from the mainland are "undependable." Pet. App. at 65a.

Amici, who practice law in St. Thomas, and particularly Mr. Hoffman, who has lived in St. Thomas almost his entire life and who has practiced law there for nearly ten years, respectfully disagree with the contention that travel, telephone connections, and mail and express service between the Virgin Islands and the mainland are so deficient that they would prevent a conscientious nonresident attorney from living up to the attorney's professional responsibilities. But, more important than opinions about how good or bad such services are in the Virgin Islands, is the fact that such services — good or bad — have almost nothing to do with the residence requirement at issue here.

First of all, the district court and the petitioners completely ignore the fact that no client will ever be required to retain a nonresident attorney, even if Rules 56(b)(4) and (b)(5) are stricken. To the extent that it might be difficult and expensive for a nonresident attorney to travel to the Virgin Islands, a client might well decide to utilize the services of a resident attorney, either exclusively or in conjunction with a nonresident. On the other hand, a client "may have a number of excellent reasons to select a nonlocal lawyer: his or her regular lawyer most familiar with the legal issues may be nonlocal; a nonresident lawyer may practice a specialty not available locally; or a client may be involved in an unpopular cause with which local lawyers are reluctant to be associated." *Frazier v. Heebe, supra*, 107 S. Ct. at 2614 n.12. These considerations apply with special force in the Virgin Islands, where specialists in such fields as taxation, complex domestic matters, and medical or legal malpractice are in short supply. Moreover, in the "small world" of the Virgin Islands it may be especially difficult for a would-be client to find a local attorney willing to sue the Government of the Virgin Islands or another powerful local interest or individual.

Second, any concern about the alleged difficulty of travel between the Islands and the mainland applies mainly to litigation, in which

court hearings may be set on short notice. However, in the Virgin Islands, as in the rest of the United States, most attorneys do not devote themselves principally to litigation, and many (like *amici*) do almost no litigation. Thus, if any residence requirement could be justified on the basis of concerns about travel, it would have to be one limited to the circumstances in which the alleged evil could be expected to manifest itself — litigation.

Third, it is obvious that fears about the inadequacy of travel, telephone service, and mail delivery have no pertinence at all to a large segment of those who are disadvantaged by Rule 56(b)(4), those who actually live in the Virgin Islands but have not yet lived there for a year. To the extent that the alleged deficiencies affect new arrivals, the new residents face no barriers to legal practice beyond the allegedly enormous ones under which all *resident* attorneys in the Islands are said to labor.

Fourth, it is apparent that neither the district court nor the petitioners recognize the significance of the *Piper* Court's insistence that developing technologies must be explored before it is concluded that all nonresidents will be barred from the practice of law due to the alleged inconveniences which they might suffer. For example, the *Piper* Court noted that telephone conference calls "are being increasingly used as an expeditious means of dispatching pretrial matters," thus reducing the need for a nonresident attorney to travel long distances. 470 U.S. at 286 n.21. A related revolution in technology, which has for the most part occurred after this Court decided *Piper* in 1985, is the increasing use of facsimile machines to transmit documents over the telephone lines. Facsimile machines are now common in law offices in the Virgin Islands and on the mainland, rendering distance practically irrelevant so far as the transfer of documents is concerned. In addition, the Virgin Islands is now served by Express Mail, Federal Express, and similar services offering delivery service which is much faster than the regular mails.

A number of the other arguments advanced by the petitioners fall quickly if scrutinized under the highly practical approach taken in *Piper*. For example, it is strenuously contended that only attorneys

who live in the Virgin Islands have any way of keeping up with legal developments. Even assuming that it is somewhat less convenient to research the law of the Virgin Islands than that of New York or California (perhaps a questionable assumption given the much larger quantities of material to be mastered in those states), it is by no means impossible or even difficult. The Virgin Islands Bar Association recently assumed the responsibility of distributing "all Territorial and District Court opinions" for the modest fee of $25.00 per year. Jt. App. at 49-50. Not only could a nonresident attorney subscribe to this service, but up-to-the-minute information on court decisions is available to anyone who takes the trouble to take out a mail subscription to a daily newspaper in the Islands. While the computerized legal research services do not yet include Virgin Islands materials in their data bases, coverage for the services has expanded greatly in recent years and may well soon embrace the relatively few volumes which comprise the decisional law of the Virgin Islands. In any event, to the extent that the tardy publication of Virgin Islands opinions constitutes a serious problem, it is a lamentable condition which should be corrected by the Government of the Virgin Islands. It would regrettable if such a circumstance, which is within the control of the proponents of the residence rule, could form any part of the justification for a residence requirement which would otherwise be declared invalid.

Perhaps the major effort made by the petitioners to come up with a "substantial reason" for the total ban on bar membership for nonresidents is the assertion that allowing nonresidents to be admitted to the bar would disrupt the implementation of the Plan of the District Court of the Virgin Islands promulgated to implement the Criminal Justice Act of 1964. The plan constitutes Rule 16 of the district court's rules. In brief, all attorneys who are actively practicing law in the Virgin Islands must accept appointments, made principally on a rotational basis, to represent indigent criminal defendants. An attorney who receives such an appointment must "communicate with the defendant at his place of incarceration as promptly as possible, and not later than five days from the date of the clerk's mailing of the order of appointment." Pet. App. at 76a. Petitioners contend that nonresident counsel could not fulfill their obligations under Rule 16

in a timely fashion, especially in light of the alleged difficulty of traveling to the Virgin Islands from the mainland. Petitioners assert that "[w]ithout a doubt, such nonresidents would seek exemption from this responsibility which is borne by all resident members of the bar." Pet. Br. at 15. *See also* Pet. Br. at 16 ("it cannot be seriously contended that a system in which nonresidents are given preference and advantage over residents in the practice of law would constitute a rule consistent with 'the principles of right and justice.' ").

Once again, petitioners' argument is both highly speculative and fundamentally inconsistent with the thrust of *Piper*. As with so many other aspects of petitioners' defense of the residence requirement, the proffered justification is flatly contradicted by the durational aspect of the rule. To the extent that the one-year residence requirement delays the admission to practice of applicants like Ms. Weatherly by approximately half a year, the number of attorneys available to share the burden of representing indigents is reduced. As to applicants who have not established residence in the Virgin Islands, it is plain that under the existing rule they will not (and cannot, because of the prohibition on the unauthorized practice of law) provide any representation to indigents in the Virgin Islands. Thus, the immediate and undeniable effect of the rule purportedly designed to assist in obtaining representation for indigents is to reduce the pool of attorneys available to provide such representation.

The essence of petitioners' complaint is that nonresident attorneys would not assume their fair share of the burden of representing indigents. Of course, at this point petitioners' fears are entirely premature, since no nonresidents have yet been admitted to the bar. *Piper*, in addressing a related argument made by New Hampshire in that case, expressed the view that it is reasonable to believe "that most lawyers who become members of a state bar will endeavor to perform their share" of pro bono and volunteer work. 470 U.S. at 287. Not only is a bar examination required of all those seeking admission to the Virgin Islands bar, *see Supreme Court of Virginia v. Friedman*, 108 S. Ct. 2260, 2266 (1988) (a bar examination "is not a casual or lighthearted exercise"), but annual bar dues and licensing fees stand as a deterrent to any who might contemplate seeking admission without

intending to pursue a substantial practice in the Islands. Having invested substantial time and effort in becoming members of the Virgin Islands bar, nonresidents are likely to carry out whatever appointments are required by the courts of the Virgin Islands as a condition of retaining a license to practice.

Respondents' challenge to some aspects of Rule 16 was not addressed by the court of appeals. Pet. App. at 8a n.4. Nor is there any reason for this Court to decide now whether nonresidents admitted to the Virgin Islands bar could properly be required to conform to every aspect of the existing appointment system as described by the district court. For present purposes, it is sufficient to note that Rule 16, if rigidly enforced in every detail, would pose difficulties for many resident attorneys comparable to those which it is feared would be experienced by nonresidents. For example, many attorneys who live and practice law in the Virgin Islands spend a substantial portion of their time "off island" due to business or personal travel. There is no justification for the appointment system to be less flexible when a nonresident attorney is involved than when a resident attorney is "off island", whether on vacation in Europe or taking a series of depositions in New York, when the appointment is made.

For the reasons discussed above, *amici* respectfully suggest that petitioners' bald assertions about why nonresidents cannot be allowed to practice law in the Virgin Islands under any circumstances are illogical, contrary to this Court's decisions in *Piper* and *Frazier*, and not an accurate description of how law is practiced in the Virgin Islands in 1988. No "substantial reason" has been shown for totally excluding qualified nonresidents from the bar of the Virgin Islands.

II. IF ANY DISCRIMINATION AGAINST NONRESIDENTS CAN BE JUSTIFIED, MEANS WHICH ARE SUBSTANTIALLY LESS RESTRICTIVE THAN RULE 56(b) ARE READILY AVAILABLE.

Even if petitioners could somehow prove that there is a substantial reason for discriminating against all nonresidents with respect to bar

admissions, they would still face the second prong of the *Piper* test, which asks whether "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." 470 U.S. at 284. "In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means." *Id.*

Once again, *Piper* itself refutes most of the arguments raised by petitioners. For example, even if petitioners' expressed concerns about poor airline, telephone and mail service were shown to have some basis, there would be no justification whatsoever for responding as petitioners have, by denying all nonresidents the opportunity to practice law in the Virgin Islands. Rather, the appropriate and least restrictive means of assuring the timely attendance of attorneys would be to impose a "local counsel" requirement in some or all cases. That is precisely the course suggested by the *Piper* Court, which observed that a "trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings." 470 U.S. at 287. Without in any way distinguishing *Piper*, petitioners would prefer to ignore its holding and simply exclude all nonresidents from the practice of law, whether or not they have associated with local counsel, whether or not the lawsuits are ones in which unscheduled meetings and hearings are likely to occur, and whether or not the nonresident attorneys have been retained to participate in litigation at all, as opposed to providing advice or assisting in a business transaction.

Petitioners' argument based on indigent criminal appointments fares no better under *Piper*'s "less restrictive means" analysis. Even assuming that the need for appointments is as great as petitioners contend, there is no reason that procedures cannot be implemented, short of completely excluding all nonresidents from practice, which would assure that nonresidents carry their fair share of the burden of providing representation for indigents. Without undertaking a comprehensive reworking of Rule 16, *amici* respectfully offer below several suggestions on how an appointment system incorporating service by nonresident attorneys could promote efforts to provide indigents with

competent representation, rather than frustrating such efforts as the petitioners contend would occur.

One simple modification which would greatly reduce the burden on residents and nonresidents alike would be elimination of the practice, which has been enforced in the district court (although not actually written into Rule 16), that "none but the appointed attorney may appear on behalf of the criminal defendant." Pet. App. at 66a. This requirement, while no doubt well-intentioned, has the effect in many instances of denying indigent defendants the most effective representation which is available. For instance, if a specialist in banking law who practices in a firm with an attorney who acquired extensive criminal experience as a public defender is appointed to represent an indigent in a criminal case pending in district court, the attorney is forbidden to turn the matter over to his much-better-qualified partner, even though such a substitution would be favored by both attorneys and by the client. Thus, the same "no substitutions" practice which would impose inconvenience on nonresident attorneys already fails in its goal of providing indigents with the best available defense while placing on bar members a burden which is no greater than necessary.

Respondent De Vos is a partner in a law firm which has a resident managing partner and two resident associates in the Virgin Islands, along with one attorney who is "of counsel" to the firm. Jt. App. at 32. If, as petitioners fear, Mr. De Vos found himself unable to personally handle a criminal defense appointment made by the district court, no unfair burden would be imposed on other members of the Virgin Islands bar if another attorney in Mr. De Vos' firm were permitted to handle the case. The only proper concern of the district court and of petitioners is that nonresidents admitted to the Virgin Islands bar accept their fair share of court appointments. There are a multitude of ways in which that goal can be accomplished, especially since there is absolutely no evidence in the record to suggest that respondents or any other nonresidents would attempt to shirk their responsibilities. It is entirely proper to expect nonresidents to assume a fair share of the burden of representing indigents; it is entirely inconsistent with the "less restrictive means" approach of *Piper* to permit the Virgin Islands courts to adopt rules governing such appointments which are unnec-

essarily inflexible, as the "no substitutions" practice is. Another readily-identifiable modification which would improve the criminal defense provided indigents while assuring that nonresident attorneys contibute their fair share would be increased reliance on voluntary representation by the members of the Virgin Islands bar of those indigents who are not represented by the public defender. To the knowledge of *amici*, there is at present no program operated by the court through which attorneys willing to accept criminal defense appointments are encouraged to make their identities known to the court. To the extent that the rates of compensation provided for by the Criminal Justice Act are found to be too low to bring forward enough volunteers, the compensation could be supplemented by an IOLTA ("interest on lawyers' trust accounts") plan of the sort used in many other jurisdictions. In fact, while a member of the board of governors of the Virgin Islands Bar Association, *amicus* Hoffman vigorously supported establishment of an IOLTA program. Such a program would raise substantial funds due to the way in which real estate transactions are structured in the Virgin Islands, using attorney trust accounts rather than escrow companies to hold the funds which are to be transferred.

There can be no question about the fact that, if the district court and petitioners were at all open to the possibility of admitting nonresidents to the bar of the Virgin Islands, adequate procedures could be devised to protect the interests of the public and the court system. *Piper*, by applying a "less restrictive means" test, requires that such procedures be utilized instead of simply banning all nonresidents from the practice of law. The intriguing question which remains is why, with less restrictive alternatives so readily available, they have not been adopted.

A number of courts and commentators have recognized the risk that restrictive bar admission rules may be used to protect the perceived economic interests of the bar rather than the interests of the public. Thus, even the two judges on the United States Court of Appeals for the First Circuit who would have upheld New Hampshire's residence requirement in *Piper* admitted that it might well have an anticompetitive purpose:

> We recognize at the outset that New Hampshire's rule may serve the less than commendable purpose of insulating New Hampshire's practitioners from out-of-state competition. It may discourage those with New Hampshire legal problems from choosing lawyers residing outside New Hampshire to represent them for two reasons. First, a nonresident lawyer who is fully familiar with New Hampshire law cannot explain this latter fact to the client by pointing to bar membership. Second, the nonresident lawyer may have to pay a fee to a New Hampshire bar member to associate the bar member with the case, should a court appearance prove necessary.

Piper v. Supreme Court of New Hampshire, 723 F.2d 110, 119 (1st Cir. 1983) (en banc) (Opinion of Campbell and Breyer, JJ.). *See id.* at 116 n.6 (Opinion of Bownes and Coffin, JJ.). Former American Bar Association President Chesterfield Smith has stated that "[m]any of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." *Time for a National Practice of Law Act*, 64 A.B.A.J. 557 (1978). *See also* Horack, *"Trade Barriers" to Bar Admissions*, 28 J. Am. Judic. Soc. 102 (1944) ("an examination of requirements for admission to the bar shows a distinct leaning toward the protection of the local student and the local lawyer with much the same effect as is created by ordinary trade barriers"). As this Court observed in *Piper*, the "Privileges and Immunities Clause was designed primarily to prevent such economic protectionism." 470 U.S. at 285 n.18.

Whatever the degree to which bar residence requirements in general have reflected economic protectionism, *amici* respectfully suggest that the geographic isolation and small size of the Virgin Islands may to some degree increase the temptation to bar admission authorities to utilize residence requirements to discourage or even prevent otherwise-qualified applicants from being admitted to the practice of law. There are a number of other statutes in the Virgin Islands which are distinctly out of line with the residence requirements imposed in most states, and taken together these statutes indicate a clear practice on the part of the Virgin Islands to insulate from change the economic and social structure of the Virgin Islands.

For example, the Legislature of the Virgin Islands recently passed a statute increasing the residence requirement for voters from 30 days prior to an election to 90 days. Act No. 5352 (approved July 15, 1988; effective for the general election in November 1990). *But see Dunn v. Blumstein*, 405 U.S. 330, 348 (1972). Loans from the Virgin Islands Small Business Development Agency are limited to those who (1) were born in the Virgin Islands, (2) have one parent who was born in the Virgin Islands, and also have themselves been residents for five years, or (3) have been residents of the Virgin Islands for ten years. 11 V.I.C. §§ 1252(a)(3), 1252(d). *See also* 29 V.I.C. § 576 (75% of the concessions granted by the Virgin Islands Port Authority must go to persons who meet the criteria set forth in 11 V.I.C. § 1252). Durational residence requirements of at least one year are also imposed on those seeking to qualify for a wide range of occupations, including podiatrists (27 V.I.C. § 168f(b), twelve months); electricians and plumbers (27 V.I.C. § 265(a)(1), twelve months); architects, engineers, and land surveyors (27 V.I.C. § 283(2), one year); and operators of automobiles for hire (20 V.I.C. § 401(a)(3), one year).

Not only does the residence requirement at issue in this case appear to reflect an improper effort to protect Virgin Islands attorneys from the perceived economic threat posed by attorneys from the mainland, but the protectionism is almost certainly contrary to the long-term economic development program being undertaken by the Virgin Islands. Just as the drafting and adoption of our Constitution was based on "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation," *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979), so will the future health of the economy of the Virgin Islands depend on the elimination of trade barriers.

Because of the necessity to reduce the traditional dependence on tourism, the Islands have attempted to attract a variety of other businesses and commercial activities. One can only hope that the inaccurate descriptions of life and work in the Virgin Islands offered by the district court in its opinion and by the petitioners in their brief never fall into the hands of a corporation which is considering relocat-

ing to the Islands or opening a facility there. While it may be tempting for the Virgin Islands to seek a refuge from what it sees as unwanted competitive pressures from the mainland, it is the Virgin Islands which will be the loser if this Court accepts the assertion that life in the Islands is inferior to that on the mainland. If a wall of economic protectionism, so foreign to the principles on which our Constitution is based, is permitted to be erected around the Virgin Islands, the residents of the Islands will be the victims, not beneficiaries, of the economic isolation which will follow.

The economic environment in the Virgin Islands will be a more attractive one if there are no unreasonable barriers preventing qualified applicants from joining the Virgin Islands bar and thereafter being available to serve the clients who may wish to retain them. *See In re Sackman*, 90 N.J. 521, 530, 448 A.2d 1014, 1019 (1982). Nor can the long-run interests of the Virgin Islands be well served by the acceptance of residence requirements which are based on the erroneous assumptions that the publication of local decisions will always be tardy, that air service will always be limited, and that mail and telephone service will always be substandard. The Virgin Islands are truly part of the United States, and it is appropriate for this Court to subject the rules governing admission to the bar of the Virgin Islands to the same scrutiny applied to bar admission requirements adopted in other jurisdictions. Under that standard, the residence requirement at issue in this case cannot stand.

Conclusion

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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September 1988